NO. 42997-7-II

(Consolidated with 42941-1-II)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROGER L. WILSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Marilyn Hahn, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Mr. Wilson was denied his constitutional right to effective assistance of counsel when his attorney failed to request a jury instruction on the defense of unwitting possession.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did Mr. Wilson receive ineffective assistance of counsel when defense counsel failed to request a jury instruction on the defense of unwitting possession?

C. STATEMENT OF THE CASE

On March 18, 2011, Roger Wilson and Paul Ortegon went to the unmanned Flying K gas station on Oregon Way in Longview. 1RP[1] at 33-34; 2RP[2] (Report of Proceedings) at 163-65. Mr. Wilson disabled the function on a gas pump that recorded sales and how much gas was dispensed. 1RP at 38, 56. Mr. Wilson filled a tank in the bed of a borrowed truck with perhaps 100 gallons of gas. 1RP at 59, 68. Mr. Wilson had no authority to disable the gas pump or to pump gas without paying for it. 1RP at 39; 2RP at 114-15.

Over recent months, the maintenance providers for the station discovered discrepancies between the numbers and types of vehicles

[1] "1RP" refers to "Volume 1" of the verbatim prepared for the appeal.
[2] "2RP" refers to "Volume 2" of the verbatim prepared for the appeal.

through the station with the amount of gas dispensed. 1RP at 34-36; 2RP at 113. The maintenance providers were able to watch live surveillance of the unmanned station from a remote location. 1RP at 40-42. After a time, they identified a truck they believed could have been responsible for at least some of the variances. 1RP at 42; 2RP at 119. The truck looked like the truck Mr. Wilson and Mr. Ortegon occupied on the evening of March 18. 2RP at 119-20. While watching surveillance, one of the maintenance persons, Chad Weller, believed he saw the suspect truck pull into the Flying K so he called the Longview Police. 2RP at 120. The police arrived, arrested Mr. Wilson and Mr. Ortegon, and impounded the truck. 1RP at 77; 2RP at 163, 165, 175.

During a later search of the truck, officers found two cigarette packs on the truck's seat. 2RP at 172, 175. One officer found a small amount, .21 grams, of methamphetamine in one of the packs. 1RP at 81-83; 1RP at 95-96.

The Flying K maintenance people later pumped virtually all of the gas out from the tank in the back of the Wilson/Ortegon truck. It was about 95 gallons. 1RP at 49. During trial, the the State presented no evidence as to the value of the gas taken or recovered. 1RP at 66.

After the truck was searched, its owner, Ronald Crisman, retrieved the truck. 2RP at 155. He testified he cleaned the truck out before loaning

it to his long-time friend Mr. Wilson who borrowed it to move furniture. 2RP at 154-55. Crisman had known Mr. Wilson for about 14 years and he'd never known Mr. Wilson to smoke. 2RP at 153, 155.

Both Mr. Wilson and Mr. Ortegon were charged with second degree theft of the gas and possession of methamphetamine. CP ("Clerk's Papers) 1-2. Neither Mr. Wilson nor Mr. Ortegon testified at trial and they presented no defense witnesses. 2RP at 193.

At the end of the State's case, Wilson successfully moved to dismiss the second degree theft charge. 2RP at 180-92. The court agreed that third degree theft was the appropriate charge as the State failed to prove any specific value for the gas. 2RP at 191-92. The jury was instructed on third degree theft and unlawful possession of a controlled substance. CP 21, 23.

Mr. Wilson did not request an unwitting possession affirmative defense instruction. Instead, Mr. Wilson proposed an instruction requiring the State to prove Mr. Wilson "knowingly possessed" methamphetamine. 2RP at 200-04. The court refused to give Mr. Wilson's proposed instruction. 2RP at 203-04.

In closing, Mr. Wilson conceded guilt on the third degree theft but argued that there was insufficient proof he knowingly possessed methamphetamine. 2RP at 261-65.

The jury found Mr. Wilson guilty of third degree theft and possession of methamphetamine. CP 26-27; 2RP 281. The jury also convicted Mr. Ortegon of the same charges. 2RP at 281. Mr. Wilson received 10 days in jail and 12 months of community custody for the methamphetamine possession charge. CP 33. Mr. Wilson now appeals only the methamphetamine possession charge. CP 41.

D. ARGUMENT

MR. WILSON DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO REQUEST A JURY INSTRUCTION ON THE AFFIRMATIVE DEFENSE OF UNWITTING POSSESSION OF METHAMPHETAMINE.

Mr. Wilson presented the defense that he did not knowingly possess methamphetamine. Yet, defense counsel did not propose the affirmative defense instruction that would have allowed the jury to acquit Mr. Wilson if they found he was in possession but the possession was unwitting. Defense counsel's failure to propose the affirmative defense instruction deprived Mr. Wilson of his constitutionally guaranteed effective counsel. Mr. Wilson's conviction for unlawful possession of a controlled substance should be reversed.

The Sixth Amendment to the United States Constitution and Article I, § 22 of the Washington Constitution guarantee the right to assistance of counsel. Such assistance must be effective. *Strickland v.*

Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish ineffective assistance of counsel, Mr. Wilson must demonstrate both deficient performance and resultant prejudice because of deficient performance. *Strickland*, 466 U.S. at 687. Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the outcome of the case would have differed. *McFarland*, 127 Wn.2d at 335. A claim of ineffective assistance involves mixed questions of law and is reviewed de novo. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001); *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995), *review denied*, 129 Wn.2d 1012(1996).

Failure to request an instruction on a potential defense can constitute ineffective assistance of counsel. *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). To determine if defense counsel's failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, the reviewing court analyzes three factors: (1) whether the defendant was entitled to the instruction; (2) whether the failure to request the instruction was a strategy or tactic; and

(3) whether the failure to offer the instruction prejudiced the defendant. See *State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009).

The State has the burden of proving the two elements of unlawful possession of a controlled substance as defined in the statute; (1) the nature of the substance and (2) and the fact of possession. RCW 69.50.4013(1); *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Defendants then can prove the affirmative defense of unwitting possession. *Staley*, at 798. This affirmative defense ameliorates the harshness of this otherwise strict liability crime. *State v. Cleppe*, 96 Wn.2d 373, 380–81, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982).

Unwitting possession is a judicially-created affirmative defense; it requires the same level of proof as other affirmative defenses. *State v. Hundley*, 72 Wn. App. 746, 749-51, 866 P.2d 56 (1994), *aff'd on other grounds*, 126 Wn.2d 418, 895 P.2d 403 (1995). An unwitting possession defense raises the issue of knowledge and can create reasonable doubt. A defendant has the burden to prove by preponderance that he unwittingly possessed the methamphetamine. *State v. Riker*, 123 Wn.2d 351, 368, 869 P.2d 43 (1994).

The defense of unwitting possession, had it been offered to the court, likely would have read as follows:

> A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.
>
> The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

11 Washington Pattern Jury Instructions (Criminal) 52.01.

A defendant is entitled to have his theory of the case submitted to the jury under appropriate instructions when the theory is supported by substantial evidence in the record. *State v. Griffith*, 91 Wn.2d 572, 574, 589 P.2d 799 (1979). In determining whether substantial evidence has been offered, the court reviews the entire record in a light most favorable to the defendant. *State v. Williams*, 93 Wn. App. 340, 348, 968 P.2d 26 (1998*), review denied,* 138 Wn.2d 1002 (1999).

Viewing the evidence in the light most favorable to Mr. Wilson, there is no question substantial evidence supported his theory of unwitting possession. The methamphetamine was concealed in a cigarette pack. Mr. Wilson is not a smoker. The cigarette pack was as close to Mr. Ortegon as it was to Mr. Wilson. The State presented no evidence that Mr. Wilson was under the influence of methamphetamine or exhibited any telltale signs of methamphetamine use such as fingertips stained by

handling methamphetamine or recent injection sites. Because the State failed to have the cigarette pack tested for fingerprints, there was no affirmative evidence to prove Mr. Wilson ever even touched the pack. Quite frankly, there was no evidence Mr. Wilson even knew the cigarette pack – and its concealed methamphetamine - was in the truck. The unwitting affirmative defense instruction would have been given had it been offered to the court.

When, as in Mr. Wilson's case, there is sufficient evidence to support an instruction on an affirmative defense, and counsel fails to request the instruction, counsel's performance is deficient. *In re Huburt*, 138 Wn. App. at 924; *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 532 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). Courts have found trial counsel ineffective for failure to propose jury instructions which correctly state the law and to which the defendant was entitled. *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) (counsel did not request an instruction on diminished capacity, even though there was sufficient evidence the defendant had been consuming alcohol); *In re Hubert*, 138 Wn. App. at 929-930 (defense counsel's performance deficient due to failure to propose the statutory "reasonable belief" defense to rape when there was evidence to support the instruction).

In *Powell*, it appeared that trial counsel was aware of the affirmative defense, and failed to request it. *Powell*, 150 Wn. App. 155. The court noted the evidence supported the "reasonable belief" instruction; defense counsel argued the affirmative defense, and the statutory defense was entirely consistent with the defendant's theory of the case. *Id.*

The same can be said here. It is clear from the evidence that Mr. Wilson's defense was he had no idea there was methamphetamine concealed in the cigarette pack which is consistent with the affirmative defense. Defense counsel argued in closing argument:

> Drug possession, the evidence is essentially there were drugs on the seat of the car. So whose are they? Where's the evidence beyond that? The evidence was [Mr. Wilson] borrowed a car. He had a conversation with a guy over the phone about getting the car. We know that he got the car. We don't know if he was alone when he got the car. We don't know if he had his friend, Mr. Ortegon, go get the car for him. We don't know any of those things.

2RP at 261.

Given the facts of this case, defense counsel's failure to propose the affirmative defense instruction was not a strategy or tactic. It was deficient performance. This is particularly true in light of the instruction given to the jury to explain what it means to have possession of a substance.

> Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.
>
> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
>
> In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

CP 20 (Instructions 15).

The jury could, and apparently did, find mere proximity to the cigarette pack containing the concealed methamphetamine was sufficient evidence in and of itself to convict both Mr. Wilson and Mr. Ortegon of its possession. Had the unwitting possession instruction been given, the jury could have found that although Mr. Wilson possessed the methamphetamine based on his proximity to it, the actual possession of the methamphetamine was unwitting because Mr. Wilson did not know it was in the cigarette pack. A conviction could have been avoided. The deficient performance prejudiced and denied Mr. Wilson a fair trial;

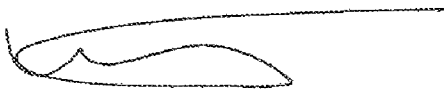
counsel failed to identify and present the sole available defense to the charged crime, despite sufficient evidence. See *In re Hubert*, 138 Wn. App. at 932.

Without instruction on the unwitting possession affirmative defense, the jury was obligated to convict Mr. Wilson if they believed he had possession of the methamphetamine merely because he could reach out and grab the cigarette pack. Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would be different. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) The jury had no way of acquitting Mr. Wilson if they believed he could merely hold the cigarette pack in his hand while knowing nothing about the very small. .21 grams, of methamphetamine in the cigarette pack. Mr. Wilson was prejudiced by counsel's deficient performance.

E. CONCLUSION

Because his counsel was ineffective, Mr. Wilson is entitled to reversal of his methamphetamine possession conviction.

Respectfully submitted on June 28, 2012.



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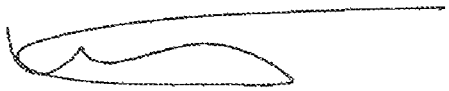
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Susan I. Baur, Cowlitz County Prosecutor's Office, at sasserm@co.cowlitz.wa.gov; (2) Backlund and Mistry, backlundmistry@gmail.com; and (3) the Court of Appeals, Division II; and (4) I mailed it to Roger Wilson at 9004 NW Ward Rd. Vancouver, WA 98682.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed June 28, 2012, in Longview, Washington.



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